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8 Attorneys for SUN MICROSYSTEMS, INC.,
9 MORGAN, LEWIS & BOCKIUS LLP, AND MAKING
10 A SPECIAL APPEARANCE FOR JEFFREY
11 KINGSTON, WHO HAS NOT BEEN SERVED

12 UNITED STATES DISTRICT COURT
13
14 NORTHERN DISTRICT OF CALIFORNIA
15
16 SAN JOSE DIVISION

17 In re Application of Microsoft Corp.

18 Case No. 06-80038 JF (PVT)

19 **RESPONSE OF SUN MICROSYSTEMS**
20 **INC., MORGAN, LEWIS & BOCKIUS LLP**
21 **AND, BY SPECIAL APPEARANCE,**
22 **JEFFREY KINGSTON, TO MICROSOFT**
23 **CORPORATION'S MOTION FOR *DE***
24 ***NOVO* REVIEW**

25 Date: To Be Set
26 Time: To Be Set
27 Before: Hon. Jeremy D. Fogel
28 Place: To Be Set

Complaint Filed: N/A
Trial Date: N/A

MICROSOFT HAS NOT SHOWN THAT A *DE NOVO* REVIEW IS APPROPRIATE

Microsoft assumes, without citing any authority under Section 1782, that the Magistrate's March 29, 2006 Order ("Order") should be reviewed *de novo* because the Order is a Dispositive Decision within the meaning of Fed. R. Civ. P. 72 and Civil L.R. 72-3. Matters concerning discovery, however, generally are considered "nondispositive." *See Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). The standard of review in nondispositive matters is the "clearly erroneous or contrary to law" standard. Fed. R. Civ. P. 72(a). The only authority directly on point that we have been able to locate is *In re Commissioner's Subpoenas*, 325 F.3d 1287 (11th Cir. 2003), which states the direct opposite. In this case, the Eleventh Circuit held that the "standard of review by which [a district court] reconsidered the magistrate judge's determination of [a motion to quash under 28 U.S.C. § 1782] is clearly erroneous or contrary to law." *Id.* at 1291 n2.

Nevertheless, even if the court decided to review the Magistrate's Order under both a *de novo* and a "clearly erroneous or contrary to law" standard, as did the court in *Highfields Capital Management L.P. v. John Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005), the Magistrate's Order should be upheld. In *Highfields Capital*, the defendant sought an order quashing a third party subpoena served by the plaintiff. The magistrate judge granted the motion to quash the subpoena. The district court reviewed the file *de novo* and, "because the defendant's motion to quash the subpoena could be characterized as a non-dispositive motion," also reviewed the report under the "clearly erroneous or contrary to law standard." *Id.* at 971. As Magistrate Trumbull's Order is based on sound reasoning and the application of established case law, under either standard, Magistrate Trumbull's Order should stand.

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1 Dated: April 17, 2006

MORGAN, LEWIS & BOCKIUS LLP

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3 By: _____/s/_____

4 James N. Penrod
5 Attorneys for SUN MICROSYSTEMS,
6 INC., MORGAN, LEWIS & BOCKIUS LLP,
7 AND MAKING A SPECIAL APPEARANCE
8 FOR JEFFREY KINGSTON
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